





## NGUYEN (Migration) [2022] AATA 1465 (12 April 2022)

### DECISION RECORD

**DIVISION:** Migration & Refugee Division

**APPLICANTS:** Mrs THI MINH NGUYEN  
Mr HOANG DAI PHAT NGUYEN  
Mr CONG THANH NGUYEN

**REPRESENTATIVE:** Mr CHRISTOPHER PARISH (MARN: 9791199)

**CASE NUMBER:** 2001904

**HOME AFFAIRS REFERENCE(S):** bcc2018/3070426

**MEMBER:** Peter Emmerton

**DATE:** 12 April 2022

**PLACE OF DECISION:** Adelaide

**DECISION:** The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211 of Schedule 2 to the Regulations
- cl 820.221 of Schedule 2 to the Regulations
- The Tribunal finds that the secondary applicants are members of a family unit of a person who satisfies the primary criteria of cl.820.211 and cl.820.221.

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Statement made on 12 April 2022 at 2:52pm

### CATCHWORDS

*MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – validly married in Australia – financial, household and social aspects of relationship – nature of commitment – substantial documentary and oral evidence – members of family unit – decision under review remitted*

### LEGISLATION

*Migration Act 1959 (Cth), s 5F*

*Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 820.211, 820.221*

**CASE**

*He v MIBP [2017] FCAFC 206*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The first named applicant (the applicant) applied for the visa on 15 August 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because they were not satisfied that they were in a genuine spousal relationship.
4. The applicant appeared before the Tribunal on 12 April 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the Sponsor Mr Phuc Long Nguyen, Mr Tam Thang Ngo and Mr Duc Phuong Hoang.
5. The Tribunal hearing was conducted with the assistance of an interpreter fluent in the Vietnamese and English languages.
6. The applicants were represented in relation to the review.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

7. The issue in the present case is whether the couple are in a genuine spousal relationship as defined by 5F of the Act.
8. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in doing so, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their particular circumstances.
9. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department.

#### **Whether the parties are in a spouse or de facto relationship**

10. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

**Are the parties validly married?**

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were married on 28 July 2018, in Woodville, South Australia, in a civil ceremony. A valid Certificate of Marriage was provided to the delegate at the time of application and this evidence is not in dispute. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

**Are the other requirements for a spouse relationship met?**

13. The applicant lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) and Partner (Residence) (Class BS) (Subclass 801) visa on 15 August 2018.
14. The applicant arrived in Australia on 20 June 2018. She is a female Vietnam citizen. DOB [Date 1], living in Australia and declares previous marriages.
15. The sponsor is a male Australian citizen, DOB [Date 2] and declares previous relationships and children.
16. Both the sponsor and the visa applicant are beyond the age of 18.
17. The couple married on 28 July 2018, in Woodville, South Australia in a civil ceremony.
18. The applicant and her children have not travelled outside of Australia since arrival into Australia on 20 June 2018.
19. The Tribunal has considered the documentary evidence provided to both the Department and the Tribunal. The Tribunal has had the benefit of taking oral evidence from the visa applicant, the sponsor and witnesses.
20. The following additional Statutory Declarations were provided to the Tribunal.  
Statutory Declaration Xuan Quynh Nguyen in 2019. Son of sponsor – Declared 03 Aug 2019  
Statutory Declaration Mr Van Tet Nguyen in 2019 (father of sponsor) – Declared 23 Jul 2019  
Statutory Declaration by Phuong Duc Hoang – Declared on 1 Aug 2019  
Statutory Declaration by Tra My Nguyen - landlord of house – Declared on 5 Oct 2019  
Statutory Declaration by Mr Vu Hung Nguyen - brother of the sponsor – 2 April 2022  
Statutory Declaration by visa applicant Mrs Thi Minh Nguyen - dated 7 April 2022  
Statutory Declaration Mr Tam Thanh Ngo- house mate of the couple – Declared 2 April 2022
21. The Tribunal has considered all aspects of the relationship. The Tribunal notes that in the period between the delegate's decision and the hearing before the Tribunal, it has been

possible for the parties to gather and present additional relevant evidence for consideration. A substantial amount of additional and relevant evidence was presented prior to the hearing.

## **22. Financial Aspects**

23. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses. The delegate was not satisfied that the couple had demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.
24. The Tribunal accepts into evidence the following documents, which in addition to the many documents provided to the delegate at the time of the original decision, clearly demonstrate a degree of financial inter-dependence.
25. Joint ANZ Progress Saver account Statements from February 2021 until present. Joint ANZ Pensioner Advantage account Statements for the same period. The accounts clearly demonstrate the pooling of financial resources as a couple. They demonstrate a transfer of monies to pay a joint mortgage for a jointly owner property in Woodville North and transfers of wages. They also show rent monies paid into a joint account for the property which is subsequently leased. Payment of a joint lease for a property in which the family currently live in Woodville Gardens is also shown.
26. The Commonwealth Bank issued joint Home Loan Mortgage documents detailing the Woodville North jointly owned property, have been provided to the Tribunal.
27. A current joint Council Rates Notices for the property the applicants own in Woodville North, which also demonstrates their joint residential arrangement as it is addressed to them both at their abode. A joint SA Water Account addressed to their joint residential address as were numerous Origin Energy Accounts which show joint responsibility for the account liability at their residential address.
28. Fixed Term Residential Tenancy Agreement and the associated Bond Lodgement form, both demonstrate joint tenancy responsibility and liability. The applicant and the sponsor have SA Drivers Licenses with their same residential address stated. The applicant has provided a statement from her Medical Practitioner demonstrating her residential address,
29. The Tribunal places significant weight on the forementioned evidence, much of which was cross-referenced at the hearing. It is satisfied that the applicant demonstrated that the financial aspects of the relationship were consistent with two people in a genuine and continuing relationship.

## **30. Nature of the Household**

31. When assessing the nature of the household the Tribunal has considered the domestic living arrangements, shared household duties, daily routines and caring for children. The delegate was not satisfied that the couple were able to demonstrate, that the nature of their household, was consistent with two people in a genuine and continuing spousal relationship.
32. The Tribunal accepts that evidence provided which indicates that the applicant and sponsor have jointly lived at the same addresses for periods of time. Evidence was provided of the 4 residences in which they cohabited along with the secondary applicants from the arrival of the applicant in Adelaide, South Australia. This was cross-checked with the evidence provided as stated in paragraphs 22-27 of this Decision. In addition, the applicant and sponsor verbally reinforced the evidence throughout the hearing.

33. Details were provided and discussed during the hearing in relation to the secondary applicant's, their schooling, their casual part-time employment and the liaison role the sponsor performs between the school educating Mr Hoang Dai Phat Nguyen and the applicant.
34. Tradition household roles and their application in relation to the sponsor and the applicant were discussed during the hearing. Views were canvassed from the applicants and the witnesses as well as reference to the substantial number of Statutory Declarations placed before the Tribunal prior to the hearing, (paragraph 20 of this Decision). The Tribunal was satisfied of their correlation.
35. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant demonstrated that the nature of the household is consistent with two people in a genuine and continuing relationship.

**36. Social aspects**

37. In assessing the social aspects of the relationship, the Tribunal has considered social interactions, evidence of joint social activities, representation of their relationship to others and recognition of the relationship by friends and family
38. The applicant did not submit any photographs showing social activities together or as a family unit. The Tribunal is unsurprised by this omission as there is substantial evidence available in the form of Statutory Declarations made by, immediate family, friends, a cohabiting long-term friend of the sponsor, (witness) and the couple's employer.
39. The documentary evidence clearly demonstrates the fact that the sponsor, the applicant and the secondary applicants are perceived by all, as a family unit. Evidence of social engagements as a couple and a family unit was provided in written form by the forementioned Statutory Declarants and as oral evidence given during the hearing, by the applicant and sponsor and their witnesses.
40. The applicant and the sponsor were able to demonstrate to the Tribunal that they represent themselves to the public, financial institutions, landlords, Tenancy Tribunal, utility providers, Councils, family members and friends as a married couple in a bona fide relationship.
41. The Tribunal places substantial weight on this evidence. The Tribunal is satisfied that the applicant and the sponsor demonstrated that the social aspects of the relationship were consistent with two people in a genuine and continuing relationship.

**42. Nature of the Commitment**

43. In relation to the nature of the commitment, the Tribunal considered the nature of the parties first meeting, relationship development, length of time living together, degree of companionship and mutual emotional support and whether they see the relationship as long term.
44. In regards, to the development of the relationship, the couple claim to have known each other since June 2017, introduced online by a mutual friend. They married in July 2018, following a meeting in January 2018 during the celebration of Tet, in Vietnam, during which time their relationship became intimate. During that time the sponsor travelled approximately 300 kilometres to meet the visa applicant's parents. The Tribunal does not dispute this. This was correlated with verbal evidence given during the hearing.



45. The Tribunal accepts the range of written and verbal evidence demonstrating that the couple have lived under the same roof with the visa applicant's children since their arrival at the invitation of the sponsor in June 2018. Their wedding which took place in the presence of the sponsor's father was also proven.
46. The Tribunal canvassed the state of the relationships with the sponsor's children in addition to the relationship between the applicant's eldest daughter living in the Philippines and the sponsor. It was satisfied by the genuineness of the verbal evidence provided.
47. The substantial evidence provided to the Tribunal detailing the couple's financial interdependence, liabilities and responsibilities, (detailed in paragraphs 22-27 of this Decision) shows very strong evidence that the couple are mutually committed in an ongoing relationship. This was further reinforced by the general demeanour of the couple. The Tribunal notes, that the bulk of this evidence was not available to the delegate at the time of their decision.
48. The Tribunal has placed substantial weight on this evidence.
49. For all of the above reasons, the Tribunal is satisfied that at the time of application and at the time of decision, the visa applicant and the sponsor were in a genuine and continuing relationship and have a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis.
50. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl.820.211(2)(a) and cl 820.221(1)(a).
51. For the reasons above, the applicant satisfies the criteria for the grant of the visa.
52. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

## **DECISION**

53. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
  - cl 820.211 of Schedule 2 to the Regulations
  - cl 820.221 of Schedule 2 to the Regulations
  - The Tribunal finds that the secondary applicants are members of a family unit of a person who satisfies the primary criteria of cl.820.211 and cl.820.221.

Peter Emmerton  
Member

## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day to day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).